

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

In re:	§	
	§	
SPEED INDUSTRIAL GAS, LLC,	§	Case No. 21-51297
	§	Chapter 11
Debtor.	§	
	§	
	§	

**OBJECTION OF MATHESON TRI-GAS, INC. TO EMERGENCY CONSIDERATION  
OF DEBTOR’S MOTION TO EXTEND THE AUTOMATIC STAY**

Matheson Tri-Gas, Inc. (“Matheson”), creditor and party-in-interest in the above-styled case, files this objection to the *Emergency Motion for Entry of an Order Extending the Automatic Stay to Debtor’s Officer and Sole Member, Ernest W. “Cotton” Speed III* [Docket No. 11] (the “Motion”).<sup>1</sup>

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider the Motion and this Objection pursuant to 28 U.S.C. §§ 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.<sup>2</sup>

**BACKGROUND**

**A. The State Court Case**

2. On August 20, 2021, Matheson commenced the State Court Case, filing suit against Speed Industrial Gas, LLC (the “Debtor”), along with Josh Baldauf, Scott Burris, Jason Fulcher,

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<sup>1</sup> Capitalized terms not defined herein have the meaning ascribed to them in the Motion.

<sup>2</sup> Out of an abundance of caution, Matheson reserves, and does not waive, any claims, defenses, arguments, or other rights regarding this Court’s jurisdiction or constitutional authority, or the propriety of venue, regarding the State Court Case, which has been removed by the Debtor to this Court (*see* Docket No. 2) as Adversary Case No. 21-51297-cag.

Brian Jackson, Robert Leal, Daniel Olivarez, and Richard Schobinger (collectively, the “Individual Defendants”).

3. On September 28, 2021, after conducting limited discovery incident to Matheson’s application for temporary injunction, Matheson amended its petition to assert claims against Ernest W. “Cotton” Speed III based on certain actions that occurred prior to the formation of the Debtor. *See* Docket No. 2-25 (Matheson’s *Verified First Amended Petition and Request for Temporary and Permanent Injunction*).

4. Matheson’s business primarily concentrates on the production, sale, and distribution of various industrial gases and rental of related equipment for the handling and storage of gas to customers throughout the United States. Matheson employs several salespersons to service the central Texas area, including, until very recently, the Individual Defendants.

5. Each of the Individual Defendants executed confidentiality and non-disclosure agreements with Matheson during their employment. Further, in exchange for Matheson’s provision of the confidential information, specialized training, and/or access to the goodwill and relationships Matheson has formed over the years with its customers, some of the Individual Defendants (Baldauf, Fulcher, Leal, and Schobinger) agreed that, for a period of 12 months after their employment with Matheson ended, they would not solicit: (a) Matheson’s employees or (b) the customers they had business contact with during the final 24 months of their employment at Matheson.

6. Beginning in January 2021<sup>3</sup>, Mr. Speed called Matheson’s office and asked to talk to one of their top salesmen about a “big project”:

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<sup>3</sup> As it relates to Matheson’s claims against Mr. Speed, while the Debtor refers to and relies upon the indemnity provisions in the limited liability company agreement to justify its request for extension of the stay, the actions

22 Q. -- when did you first contact Mr. Speed?  
23 A. I did not contact Mr. Speed. He --  
24 Q. When did he contact you?  
25 A. I believe that was in early -- late January.  
16:1 Q. How did he contact you?  
2 A. There was a phone call that was placed at our  
3 store, and he -- Mr. Speed said there was -- he had a  
4 big project in New Braunfels, Texas, and he needed to  
5 talk to one of my top salesmen.  
6 Q. So Cotton Speed called you or called the office  
7 generally?  
8 A. He called the general number at the office.  
9 Q. Did you receive that phone call or did someone  
10 else receive it?  
11 A. I picked up the phone that time.  
12 Q. And when he said he needed to talk to one of  
13 your top salesmen, did you direct him to someone?  
14 A. Yes, sir. Well, I told him who my top salesman  
15 was.

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7. Thereafter, Mr. Speed began meeting and communicating with one or more Matheson employees about the soon-to-be-formed competitor—now, the Debtor. After months of coordination and planning, beginning in May 2021, the Individual Defendants resigned from Matheson in quick succession. Prior to their respective departures, both Mr. Burris and Mr. Shobinger violated their contractual obligations and fiduciary duties by misappropriating Matheson’s confidential information and/or soliciting Matheson employees to leave their employment with Matheson.

8. For example, in early February 2021, Mr. Burris accessed Matheson’s internal customer management system to create curated lists of Matheson’s “Top Accounts” with those customers’ year-to-date sales volumes at Matheson (by dollar amount), and then intentionally disclosed that list to Mr. Speed:

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giving rise to Matheson’s claims against Mr. Speed occurred prior to the formation of the Debtor. As such, the indemnity provision is likely inapplicable.

<sup>4</sup> This is a brief excerpt from Scott Burris’s deposition on September 21, 2021.

**From:** Scott Burris [sburris4242@gmail.com]  
**on behalf of** Scott Burris <sburris4242@gmail.com> [sburris4242@gmail.com]  
**Sent:** 2/12/2021 10:02:09 AM  
**To:** cottonspeed@ymail.com  
**Subject:** Top Accounts  
**Attachments:** Top Accounts Ex.xlsx

Take a look at this when you can. I'll give you a call.

Thanks,  
Scott

9. Following the Individual Defendants' resignations, Matheson began to receive notices from its customers of the solicitations by the Individual Defendants.

10. Accordingly, Matheson's claims against the Debtor, the Individual Defendants, and Mr. Speed relate to the unlawful misappropriation, use, and disclosure of Matheson's trade secret confidential information; numerous breaches and violations of the Individual Defendants' post-employment obligations to Matheson; and tortious interference with Matheson's business relations and contracts.

11. On October 4, 2020, the state court entered a temporary injunction, enjoining the Debtor, Mr. Speed, and the Individual Defendants as follows:

- a. Defendants and those acting in concert or participation with them who receive actual notice of this Order by personal service, via email, certified mail return receipt requested, regular US mail, through their attorney, or otherwise, are restrained from directly or indirectly disclosing or using any of Matheson's Confidential Information;
- b. Baldauf, Fulcher, Leal, and Schobinger, and those acting in concert or participation with them who receive actual notice of this Order by personal service, via email, certified mail return receipt requested, regular US mail, through their attorney, or otherwise, are restrained from directly or indirectly soliciting any current Matheson employee to alter, leave, or cease their employment relationship with Matheson;
- c. Baldauf, Fulcher, Leal, and Schobinger, and those acting in concert or participation with them who receive actual notice of this Order by personal service, via email, certified mail return receipt requested, regular US mail, through their attorney, or otherwise, are restrained from directly or indirectly soliciting any Matheson customer with whom Baldauf, Fulcher, Leal, and Schobinger personally had contact during the final twenty-four (24) months of their respective employments with Matheson:
  - i. to purchase services or products that are competitive with those marketed, offered for sale, and/or were under any stage of development by Matheson during their respective employments; or
  - ii. to alter, leave, or cease their business relationship with Matheson for any reason; and
- d. Defendants and those acting in concert or participation with them who receive actual notice of this Order by personal service, via email, certified mail return receipt requested, regular US mail, through their attorney, or otherwise, are restrained from deleting or destroying documents and communications with customers or prospective customers or any Matheson Confidential Information in their possession, custody, or control in hard copy or on any electronic devices in their possession, custody, or control, including, but not limited to, computers, laptops, cell phones, smart phones, PDAs, tablets, or other electronic devices.

A copy of the temporary injunction order is attached hereto as **Exhibit A**.

**B. The Chapter 11 Case and Adversary Proceeding**

12. On October 22, 2021, the Debtor filed its voluntary Chapter 11 petition, commencing the above-styled Chapter 11 case.

13. On October 23, 2021, the Debtor filed its Notice of Removal, removing the State Court Case incident to the Debtor's Chapter 11 filing. This case is now pending before this Court

as Adversary Case No. 21-51297-cag (the “Adversary Proceeding”). The Court has set a status hearing in the Adversary Proceeding on November 10, 2021.

14. On October 24, 2021, the Debtor filed its Motion, asking the Court to extend the automatic stay to Mr. Speed in connection with the State Court Case on an emergency basis. The Debtor’s counsel did not serve Matheson’s counsel via e-mail, and as of the filing of this objection, Matheson’s counsel has not received service of the Motion. Matheson’s counsel only learned of the Motion in reviewing the docket of this Chapter 11 Case on PACER.

15. The basis offered in the Motion for the requested stay is simply that Mr. Speed will be “distracted from his duties as officer and principal of the Debtor, resulting in prejudice to the Debtor’s reorganization efforts.” Moreover, the Debtor alleges that “if discovery were to proceed in the State Court Case” that Matheson would seek documents from the Debtor and Mr. Speed, “creating an even further burden on the Debtor’s estate.” The basis provided for emergency relief is the conclusory statement that “[f]ailure to receive the requested relief during the first 21 days of the Chapter 11 Case [ ] would severely disrupt the Debtor’s operations at this critical juncture.”

16. On October 25, 2021, the Debtor filed its *Request for Emergency Consideration of Certain First Day Matters* (Docket No. 13) (the “First Day Hearing Request”), asking this Court to set a hearing on the Motion as well as a number of more typical first-day motions on an emergency basis.

17. On October 26, 2021, the Court entered its Order (Docket No. 19) granting the First Day Hearing Request and setting the Motion and various other first-day motions for hearing on October 28, 2021 at 10:00 a.m. (the “First Day Hearing”).

## **OBJECTION**

18. As an initial matter, although Matheson's counsel is listed in the Debtor's Motion's certificate of service, as of the filing of this objection, Matheson's counsel has not received service of the Motion, the First Day Hearing Request, or notice for the First Day Hearing. Upon review of the Debtor's bankruptcy case on October 26, 2021, Matheson's counsel discovered the Motion, along with the notice of hearing for October 28, 2021. As a result, Matheson has not had adequate time to respond to the Motion. To ensure that it timely registers an objection to the Motion for the purposes of the First Day Hearing, Matheson formally objects to the relief sought by the Debtor in its entirety and states that the allegations in the Motion fail to satisfy the very high threshold under Fifth Circuit precedent for extending the automatic stay to a non-debtor.

19. For the reasons stated below, Matheson believes that the Motion does not satisfy the standard for emergency relief and asks that this Court set the Motion for hearing on standard notice. In the event, however, that the Court determines that some form of expedited hearing on the Motion is appropriate, Matheson asks, in the alternative, that the hearing on this Motion be continued to a later date to give Matheson adequate and sufficient time to respond to the Motion, given the deficient notice it received and the extremely short timeline on which the Debtor is seeking to have the Motion heard.

20. However, even if Matheson was given timely notice, the Debtor's Motion is not appropriate for emergency consideration. The Motion contains a boilerplate recitation of Bankruptcy Rule 6003's "immediate and irreparable harm" requirement for emergency relief, but fails to identify any imminent threat or event that could even colorably satisfy that standard. Instead, the Debtor alleges only a conclusory statement that failure to receive the requested relief during the first 21 days of the case "would severely disrupt the Debtor's operations at this critical

juncture” and thus alleges that it has satisfied the “immediate and irreparable harm.” *See* Docket No. 11 at ¶ 25. The Motion, however, was filed on October 24, 2021—the day after the Debtor removed the State Court Case to this Court. *See* Docket No. 2. As the State Court Case is now pending before this Court as the Adversary Proceeding, the Debtor cannot show immediate and irreparable harm to permit emergency consideration of the Motion. In addition, the Debtor’s complaint regarding discovery is inapplicable as there is no outstanding discovery, nor will any discovery be served prior the Court’s status hearing in the Adversary Proceeding on November 10, 2021.

21. Given the lack of notice and the Debtor’s request for emergency consideration of the Motion, Matheson files this objection to the consideration of Debtor’s Motion on October 28, 2021, expressly reserving any and all claims, defenses, arguments, and other rights relating to the Motion, the Debtor’s request to extend the automatic stay to Mr. Speed, and/or Matheson’s right to request remand and/or abstention in the Adversary Proceeding at a later date.

### **CONCLUSION**

Accordingly, Matheson respectfully requests that this Court (a) deny the Debtor’s Motion; (b) in the alternative, continue or otherwise reset the hearing on the Motion to provide Matheson with adequate time to respond to the Motion; and (c) award Matheson any such other relief that this Court may deem appropriate.



October 28, 2021

Respectfully submitted,

**FOLEY & LARDNER LLP**

/s/ Mike Seely

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**COUNSEL FOR MATHESON  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing filing was served on this, the 28<sup>th</sup> day of October, 2021 on all parties entitled to receive service through the Court's ECF system.

I further certify that the foregoing was also served by U.S. first class postage pre-paid on each person on the attached matrix.

/s/ Mike Seely

Mike Seely

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